MOTION FILED
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NO. 82-940

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

v.

KING & SPALDING, A PARTNERSHIP,

Respondent,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF OF AMICUS CURIAE, NEW ENGLAND LEGAL FOUNDATION, IN SUPPORT OF RESPONDENT.

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ISSUE PRESENTED FOR REVIEW

Does Title VII of the Civil Rights Act of 1964 apply to invitations to join a voluntary association of lawyers for the purpose of practicing law as a partnership?

MOTION OF NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Pursuant to Rule 36.1 of the Rules of the Supreme Court, the New England Legal Foundation moves this Court for leave to file a brief amicus curiae, bound with this motion, in support of respondents.

New England Legal Foundation (NELF) is a non-profit, public interest law foundation, organized and existing under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on matters affecting the economic interests of the people and businesses of New England. The Foundation has consistently supported the proposition that a proper balance between the rights and interests of employers and employees is essential to the operation of our free enterprise system.

To this end the Foundation has previously participated as an amicus party before this Court in National Labor Relations Board v. Transportation Management Corporation,

No. 82-168, in support of the proposition that the burden to be placed on an employer in a proceeding pursuant to Section 8(a)(3) of the National Labor Relations Act is that of producing credible evidence to rebut or neutralize a prima facie case of discrimination, and not that of overcoming the prima facie case. The Foundation has also filed as an amicus in Kevin H. White v. Massachusetts Council of Construction Employers, ___ U.S. ___, 51 U.S.L.W. 4211 (February 28, 1983), and United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden, No. 81-2110, arguing that the imposition of residency-based hiring quotas infringes the equality of economic opportunity guaranteed under the Privileges and Immunities Clause of the Constitution.

The Foundation supports the rights of employees to enjoy the terms, conditions and privileges of employment free from discrimination, but refutes the contention that the employment

protection guaranteed in Title VII of the Civil Rights Act of 1964 was intended by Congress to apply to decisions pertaining to the ownership of a business. The Foundation, therefore, agrees with the Eleventh Circuit that Title VII does not apply to the decision by the partners of a law firm to refuse to offer an associate an invitation to join the partnership.

The Foundation's public interest perspective will provide this Court with a point of view which might not otherwise be presented in the instant case.

For the foregoing reasons, New England Legal Foundation respectfully requests that this

Court grant leave to file the acompanying brief amicus curiae in support of the Respondent.

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STATEMENT OF INTEREST

This brief amicus curiae is filed contingent on the allowance of the foregoing Motion for Leave to File said brief. The interest of the amicus curiae in this case is set forth in that Motion.

STATEMENT OF THE CASE

In 1972, the Petitioner, Ms. Hishon, accepted a position as an associate with King & Spalding, an Atlanta law firm with approximately fifty partners and fifty associates. At the time Ms. Hishon became associated with the firm, consideration for partnership occurred at the end of an associate's sixth year and the firm maintained an "up or out" policy. In 1978 the partnership considered extending partnership offers to Ms. Hishon as well as to the other associates hired in 1972. The partnership declined to extend the invitation to Ms. Hishon and to two male associates. Ms. Hishon left the firm in 1979.

Prior to her departure from the firm, Ms. Hishon filed a sex discrimination claim with the Equal Employment Opportunity Commission. The Commission issued a Notice of Right to Sue, and Ms. Hishon filed her complaint in District Court within the statutory 90-day period. The only count

of the complaint considered by the District Court alleged sex discrimination in the firm's decision not to make Ms. Hishon a partner. The District Court dismissed the complaint on the grounds that Title VII of the Civil Rights Act of 1964 is inapplicable to partnership decisions. In an opinion reported at 678 F. 2d 1022 (June 17, 1982), the Court of Appeals for the Eleventh Circuit upheld the District Court. Motions for Rehearing and Rehearing En Banc were denied on September 9, 1982. A Petition for a Writ of Certiorari was granted by this Court on January 24, 1983.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 prohibits an employer from discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex or national origin. Petitioner alleges that these provisions apply to a law partnership when deciding whether to offer a share in the ownership of the business to an associate in the firm.

Petitioner contends that the partners of a law firm are equivalent to employees of a corporation and therefore partnership decisions are analogous to promotions. This argument ignores the fundamental attributes of a partnership, a form of business entity in which the partners voluntarily associate in a business venture, and individually assume their share of the risks and profits of the enterprise. Even though a partnership may have an established institutional identity independent of its

individual partners, this does not lead to the conclusion that for purposes of Title VII the partners are employees rather than the owners of the partnership. Neither does the fact that the partners practice law for the firm change their status from owners to employees.

Although Title VII protects an individual from discrimination in employment opportunities, the term "employment opportunities" may not be interpreted to include the private decisions of individuals to voluntarily associate in a business partnership. To do so would ignore the distinctions between the terms and conditions of employment and terms and conditions of ownership of a business.

Furthermore, a termination of employment as a result of the failure to receive a partnership offer is not an unlawful discharge prohibited by Title VII. The "up or out" policy enforced by a law firm is a nonrenewable contract subject to terms negotiated between the firm and an associate.

Once the term of that contract has expired the expectation of the employee concerning continued employment as an associate expires with it. While an associate may, if invited, rejoin the firm in a new role, that is as an owner, the associate has no legally enforceable expectation to continue employment as an employee of the firm.

ARGUMENT

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 DOES NOT APPLY TO INVITATIONS TO JOIN A VOLUNTARY ASSOCIATION OF LAWYERS FOR THE PURPOSE OF PRACTICING LAW AS A PARTNERSHIP.

Pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, it is an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Petitioner alleges that these provisions apply to a law partnership when deciding whether to offer a share in the ownership of the business to an associate in the firm. This allegation rests upon the arguments of Ms. Hishon that: (1) the partners at a large law firm are equivalent to employees of a corporation; (2) elevation to partnership is an employment opportunity or a term, condition or privilege of employment protected by Title VII; and (3) termination of employment as a result of failure to make partner falls within the ambit of an unlawful discharge prohibited by Title VII.

A. Title VII Does Not Alter The Legal Distinction Between a Corporation and a Partnership.

In order to establish the employment context for the application of Title VII, Ms. Hishon argues that a partnership is analogous to a corporation. If the partnership possesses a separate and distinct identity similar to that of a corporation, so the argument goes, its partners are more like employees than owners. Consequently, Ms. Hishon contends that Title VII is applicable to partnership decisions, since those decisions relate merely to a promotion to a managerial position in the company, rather than to a determination of participation in the ownership of the firm.

While the lower court acknowledged that large law partnerships possess many attributes common to corporate forms of business, Hishon v. King & Spalding, 678 F. 2d 1022, 1026 (11th Cir. 1982), it is far too simplistic to equate a partnership to a corporation merely because of the size of the firm, the benefits provided employees,

or the existence of a comprehensive management system. In requesting that this Court ignore the legal form of doing business in order to concentrate solely on the business being performed, the Petitioner seeks to negate the very reasons for the existence of the partnership form. As this Court has stated, "A partnership is generally said to be created when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits or losses." Commissioner of Internal Revenue v. Tower, 327 U.S. 280, 286 (1946). Unlike a corporation, an entity which itself receives profits and incurs losses, and whose shareholders are insulated from personal responsibility, in a partnership the partners voluntarily associate in a business venture and individually assume their share of the risks and profits of the enterprise.

Furthermore, in this matter there is no allegation that the partnership of the law firm in question was created or is operating as a pretense or a sham, that is, a partnership in form but not in substance. Unlike the partnership under scrutiny in Commissioner of Internal Revenue, supra, where a business previously transacted in corporate form was dissolved and reconstituted as a partnership even though only one partner contributed capital or labor to the partnership, the Court of Appeals here has already made a factual determination that King & Spalding is a legitimate partnership.

> King & Spalding operates as a partnership. It is comprised of fifty active partners and employs approximately fifty associates along with other support personnel. It has a lengthy partnership agreement with detailed provisions as to profits, losses, withdrawal, dissolution, etc.

Hishon v. King & Spalding, 678 F. 2d at 1028.

Given this factual determination by the court below, the question becomes whether the partners

of a valid partnership may be deemed to be employees, rather than owners, of the partnership for the purposes of Title VII. While this Court has held that partnerships have "an established institutional identity independent of its individual partners," Bellis v. United States, 417 U.S. 85 (1974), the rationale supporting that principle is inapplicable to the issue before this Court. The question in the Bellis case was whether the Fifth Amendment privilege of an individual partner could be invoked to prevent the production of partnership records. In holding that the Fifth Amendment privilege against self-incrimination does not protect against disclosure of the financial books and records of a partnership, the Court identified various factors as determinative in establishing that an organization possesses an independent institutional identity. The Court concluded that this identity is established when a partnership represents a formal institutional arrangement organized for the continued conduct of the firm's

existence, and when the firm maintains a bank account in the partnership name, has stationery using the firm name on the letterhead, and in general holds itself out to third parties as an enterprise with an identity which is independent of the individual partners. Id. at 95-97.

The fact that a partnership may have an identity which is independent of the individual partners does not, however, lead to the conclusion that for purposes of Title VII the partnership is an employer and the partners merely employees of the firm. The status of a partner as an employee or an employer under Title VII is a question of federal law "to be ascertained through consideration of the statutory language of the Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand." Calderon v. Martin County, 639 F. 2d 271, 271-73 (5th Cir. 1981). Unfortunately, neither the statutory language nor the legislative history of Title VII assists in clarifying the issue. Title VII

merely defines an employee as "an individual employed by an employer." 42 U.S.C. §2000e(f) (1976). The legislative history simply indicates that the term "employer" is "intended to have its common dictionary meaning, except as expressly qualified by the Act." 110 Cong. Rec. 7216 (April 8, 1964).

Although this Court has held that part ownership of a business does not preclude the classification of an individual as an employee subject to federal employment legislation, Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961), the few courts which have considered the narrow issue of whether partners are employees or employers of the partnership have either stated explicitly or implied that partners retain their status as employers. As the Eleventh Circuit analyzed the issue:

> It would be unrealistic to assume a person cannot maintain a proprietary interest and simultaneously work in the business. Mutual exclusivity

> neither exists nor is required in a law firm to maintain its desired partnership structure. This lack of exclusivity, however, does not render the term "partner" equivalent to the term "employee" for purposes of title VII.

Hishon, 678 F. 2d at 1027. Similarly, the Seventh Circuit, in determining whether it had subject matter jurisdiction over a Title VII claim against a firm which consisted of four partners and thirteen non-partners, concluded that, "We do not see how partners can be regarded as employees rather than employers who own and manage the operation of the business." Burke v. Friedman, 556 F. 2d 867 (7th Cir. 1977). Likewise, in determining whether attorneys associated with a law firm were employees of that firm, the District Court in Equal Employment Opportunity Commission v. Rinella & Rinella, 401 F. Supp. 175 (N.D. Ill. 1975) stated that "[S]ince the firm is not a partnership, and the associates are not listed as 'of counsel,' it is only reasonable to conclude that they are employed by

the firm." Rinella, 401 F. Supp. at 181. This passage has been interpreted as indicating that if the attorneys were partners in the law firm rather than associates, they would not be treated as employees. Burke, 556 F. 2d at 869, n. 1.

The court below, therefore, based upon the precedent available and its common sense understanding of a business partnership, concluded that it is improper to ignore the form and substance of a commercial enterprise in order to artificially extend the coverage of Title VII by equating partners of a partnership with employees of a corporation. As the court correctly concluded, "[T]he partnership is [Ms. Hishon's] employer; the partners own the partnership; they are not its 'employees' under Title VII." Hishon, 678 F. 2d at 1028.

B. An Offer to Become a Partner of a Law Firm is Not a Promotion or Employment Opportunity Protected Under Title VII.

Once it has been determined that a partner in a law firm is not an employee of that firm for Title VII purposes, Ms. Hishon's argument that an invitation to join the partnership is a mere promotion or employment opportunity must fail. However, as an alternative argument, the Petitioner contended before the Court of Appeals that should the Court decline to equate partners with employees, it must find the "opportunity" for promotion within the statute's purview. Hishon, 678 F. 2d at 1028.

It is undisputed that the phrase "employment opportunity" can include a promotion to a position beyond that of an "employee" covered by Title VII. In an analogous situation under the National Labor Relations Act, an employee, if promoted to a supervisory position, would no longer have been protected by that Act. Yet, as the Second Circuit Court of Appeals stated in upholding the

applicability of the Act, "[T]he Act protected him as long as he held a nonsupervisory position, and it is immaterial that the protection thereby afforded was calculated to enable him to obtain a position in which he would no longer be protected." National Labor Relations Board v. Bell Aircraft Corp., 206 F. 2d 235, 237 (2nd Cir. 1953); accord, Golden State Bottling Co., Inc. v. National Labor Relations Board, 414 U.S. 168 (1973). It is further undisputed that Title VII applies equally to both professional and non-professional employment. Hecht v. Cooperative for American Relief Everywhere, Inc., 351 F. Supp. 305 (S.D. N.Y. 1972).

What is at issue in the instant appeal, however, is not whether Ms. Hishon would be afforded Title VII protection if she were seeking promotion to a professional upper management position. Rather, the issue is whether such protection is afforded by Title VII if she seeks to become an employer with a partial ownership interest in the firm. It is, thus, the fact that an

offer to join a partnership includes an assumption of the benefits and liabilities of ownership which distinguishes this case from the National Labor Relations Act cases and from other Title VII actions.

The Court of Appeals in this context, therefore, correctly analyzed the few reported cases. In Pettway v. American Cast Iron Pipe Co., 494 F. 2d 211 (5th Cir. 1974), rehearing en banc denied, 494 F. 2d 1296 (5th Cir. 1974), for example, the Fifth Circuit held that election to a Board of Operatives was a valuable term, condition, or privilege of employment. As the lower court comments, however, the Pettway case is unique on its facts due to the manufacturing company's organizational structure. Hishon, 678 F. 2d at 1028. The owner of the company had devised a management plan which set up a Board of Management and a Board of Operatives. The Board of Operatives was comprised of elected, nonsupervisory personnel from which blacks were

excluded. Upon the owner's death, all outstanding common stock was bequeathed to the Boards to be held in trust for the employees. Because the Court found election to the Board of Operatives to be a valuable term, condition, or privilege of employment under Title VII, it ordered that the discrimination be ended. Pettway, supra. However, as the Hishon Court pointed out, the employees elected to the Board of Operatives remained employees even while serving on the Board and "never actually 'owned' the company in their individual capacities, but acted 'in trust' for all present and future employees." Hishon, 678 F. 2d at 1029. The Court also emphasized that the complex management structure devised by the owner in itself caused election to the Board to become a valuable term, condition or privilege of employment. Id. Pettway is, therefore, clearly distinguishable from the case at hand, in which the partners at King & Spalding actually own the firm and there are no unique aspects to the firm's

management structure which in and of themselves cause elevation to partnership to become a valuable term, condition, or privilege of employment.

A more problematic decision was reached by the District Court in Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D. N.Y. 1977), in which the Court denied a motion to dismiss a Title VII complaint alleging unlawful discharge of an associate on the basis of his national origin and religion. Except for passing remarks that the Court need not decide whether Title VII applies to partners inter se, and that the application of Title VII might be different if the firm were firing a partner or considering a non-associate for partner, the Court neglected to address the ownership aspects of the decision to grant or withhold partnership status. Rather, it misguidedly equated a partnership offer with a progressional promotion. Id. at 128. As has been stated previously, it is a fundamental error to ignore the distinctions

between the terms and conditions of employment and the terms and conditions of ownership. Moreover, the statement in Lucido that the opportunity to become a partner at Cravath was a term, condition or privilege of employment was merely dicta, since the Court had already determined that a claim for relief had been stated under Title VII, and the Hishon Court quite properly and unequivocally rejected that dicta. Hishon, 678 F. 2d at 1029. Rather, in continuing to stress the unique attributes of a partnership, the Court correctly reiterated its refusal to extend the meaning of "employment opportunities" beyond its intended context and thus encroach upon the private decisions of individuals to voluntarily associate in a business partnership. Id. at 1028.

C. **Termination of Employment as a Result of the Failure to Receive a Partnership Offer is Not a Unlawful Discharge Prohibited by Title VII.**

It is undisputed that Title VII prohibits certain discriminations in the firing of an associate

in a law firm which is subject to the Act. However, Ms. Hishon seeks to equate the discriminatory firing of an associate with the termination of an individual, pursuant to a standard, predetermined, and clearly disclosed policy, as a consequence of the decision not to offer an opportunity to participate in the ownership of the enterprise. While superficially appealing, this argument again ignores the fundamental essence of the partnership form, namely, the voluntary association of persons to share in the profits, losses and management of the business. Partners at King & Spalding, while engaging in the practice of law for the firm, are not employees of the firm but are owners of the firm. Termination under the "up or out" policy complained of by the Petitioner — by which discharge is automatically triggered by a decision against the offer of an ownership interest, a decision not subject to Title VII — bears no similarity to a discriminatory termination of an

employee's rightful expectation of continued employment.

The "up or out" policy reflects a management decision that no associate should be employed by the firm for more than six years, in addition to grace periods granted in order to allow associates who have not been invited into the partnership to find new employment. Nothing in this case indicates that this policy has been applied or waived in a discriminatory fashion. Put simply, the respondent's policy may be viewed as a six-year nonrenewable contract of employment between the firm and the associate. Once the six-year term has expired, the expectation of the employee concerning continued employment as an associate expires. It is at this juncture that the individual is considered for an ownership role in the firm, that is, to be offered a partnership under mutually agreeable terms. His employee status is terminated, in fact, regardless of the partnership decision. In accordance with the firm's universally

applied policy, at the close of the six-year term an employee either becomes a co-owner of the firm, or seeks employment elsewhere. As the Hishon Court pointed out,

> [P]rospective associates are apprised not only of their potential for partnership, but also of the consequences to be suffered following an unfavorable decision. Just as she accepted a representation made to her concerning partnership consideration, [Ms. Hishon] likewise assumed the risk that an unfavorable decision would set in motion the termination procedure under the firm's "up or out" policy."

Hishon, 678 F. 2d at 1029.

However, both the dissent of Judge Tjoflat in the instant case and the opinion of Judge Gagliardi in the Lucido case seek to distinguish the partnership decisions pertaining to present associates from partnership invitations to attorneys not associated with the firm. As Judge Tjoflat stated, "[W]hile I agree that Title VII would not apply to the discrete decision whether to

take on a new partner, when the partnership decision inextricably and inevitably is a decision whether to terminate employment, I would hold that Title VII applies." Hishon, 678 F. 2d at 2030. This view ignores the fact that the nature of the decision to make a partnership offer — to join the "voluntary" association — is the same whether the applicant has been or has not been associated with the firm. The offer of partnership is just that, an offer to share in the ownership, and not an offer of employment. Consequently, as an offer of ownership, the invitation is not a term, condition, or privilege of employment or an employment opportunity encompassed by Title VII.

Moreover, a contrary opinion unleashes consequences unwarranted by the language of Title VII. Logically, if a partnership decision is deemed to fall under the auspices of Title VII, all other forms of ownership should be equally regulated. Thus, a closely held corporation in which stockholders are also employees would be required

to hold stock options open to all other employees as a term, condition or opportunity of employment. Likewise, a family owned corporation would violate Title VII by extending ownership only to relatives who happen to be of the same race, religion or national origin. Once a business entity employs more than fifteen employees, the form of that entity would become merely a legal fiction under Title VII. If the coverage of Title VII is to be expanded to this extent, it is the responsibility of Congress and not the Courts to dictate such a change.

CONCLUSION

An offer to share in the ownership of a business is not a term, condition, privilege or opportunity of employment to which Title VII applies. The opinion of the Eleventh Circuit Court of Appeals dismissing Petitioner's suit alleging discrimination by a law firm in refusing to invite

her into a partnership should, therefore, be affirmed.

By its Attorneys,

June 7, 1983

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